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NO. 94-2034

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EMPRESA NACIONAL SIDERUGICA, S.A.,
Petitioner,

versus

JERRY YOUNG,
Respondent.

On Petition For Writ Of Certiorari To The
Louisiana Court Of Appeal For The Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The following are parties to this proceeding:

1. Jerry Young, plaintiff/respondent;

2. Cooper/T. Smith Stevedoring Company, Inc.,[1] intervenor/respondent; and

3. Empresa Nacional Siderurgica, S.A. - defendant/petitioner.

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1 Pursuant to Supreme Court Rule 29.1, Cooper/T. Smith Stevedoring Corporation is the parent company of Cooper/T. Smith Stevedoring Company, Inc.; River Grain Elevators, Inc. and Paco Terminals, Inc. are the only two non-wholly owned subsidiary companies of Cooper/T. Smith Stevedoring Company, Inc.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On November 22, 1982, Jerry Young (hereinafter "Young"), a longshoreman employed by Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper"), was injured while offloading a cargo of steel I-beams from the M/V LORENA, an oceangoing cargo vessel that was owned and operated by Armadores de Cabotaje, S.A. (hereinafter "ARCASA") and voyage chartered by Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA"). ENSIDESA, pursuant to a charter party with ARCASA, loaded, stowed

and arranged for discharge of the cargo of I-beams. ENSIDESA employees prepared a stowage plan for the cargo, which was approved by the master of the M/V LORENA, an employee of ARCASA.

ENSIDESA loaded the cargo of I-beams aboard the M/V LORENA in a "H" configuration, as opposed to the preferred "I" configuration. The "I" configuration is preferred because it does not destroy the wooden dunnage (scraps of wood placed between the layers of cargo), making the cargo easier and safer to discharge.

The M/V LORENA arrived in New Orleans in November 1982 to discharge a portion of its cargo. At this time, ENSIDESA hired Cooper to offload the cargo. Cooper's personnel inspected the vessel and her cargo before beginning the discharge operations. Despite the fact that the cargo was loaded in the "H" formation, the Cooper supervisor authorized the longshoremen to offload the cargo. Recognizing the situation, Cooper proceeded because neither ARCASA nor ENSIDESA provided an alternative means of offloading the cargo. As Cooper offloaded the cargo, the effects of the "H" beam loading method became more apparent. As the longshoremen worked farther down into the hold, the crushed nature of the wooden dunnage became even more apparent. Indeed, at some locations, several bundles of I-beams were resting directly on the bundles below them.

In order to discharge the cargo, the longshoremen, including Young, were required to "nip" the beams by trying to wedge a "breakout wire" under the edge of the bundle of

beams. Once the steel wire was beneath an end of a beam, the crane operator would lift the beam slightly enabling the longshoremen to place the chain which is actually used to lift the cargo beneath the slightly raised beams. This procedure is then utilized again on the other end of the bundle of beams. While attempting to nip a bundle of beams, a breakout wire slipped off, struck Young, and caused him to fall and sustain injuries.

In October of 1984, Young filed suit against ARCASA for vessel negligence pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §905(b). Cooper intervened in that action, seeking to recover payments of medical expenses and compensation benefits paid to and/or on behalf of Young pursuant to the LHWCA. Young later amended his Petition to name ENSIDESA as a defendant as well. ARCASA and ENSIDESA both filed Cross-Claims for indemnity against the other. After a jury trial on April 17, 1989, the jury returned a verdict, finding ARCASA 15 percent at fault and ENSIDESA 85 percent at fault in causing Young's damages.

The District Court's judgment also recognized Cooper's lien for compensation benefits. Immediately prior to the trial, the District Court severed Cooper's intervention, presumably so that it would be tried at a later date. However, all parties subsequently agreed to the amount and nature of Cooper's lien, and included Cooper's lien in the final judgment. Because Cooper's recovery is dependent on Young's recovery in the main demand, Cooper now appears before this Honorable Court as a respondent to ENSIDESA's Petition for Writ of Certiorari.

ARCASA and ENSIDESA both appealed to the Fourth Circuit Court of Appeal of the State of Louisiana. The Louisiana Fourth Circuit reversed the District Court's dismissal of ARCASA's Cross-Claim, ordering ENSIDESA to indemnify ARCASA, and also reduced the damage award. All other aspects of the Judgment were affirmed. *Young v. Armadores de Cabotaje, S.A., et al*, 617 So.2d 517 (La. App. 4th Cir. 1993). Writ Applications to the Louisiana Supreme Court were denied. 625 So.2d 170, 171 (La. 1993).

Both ENSIDESA and ARCASA petitioned this Honorable Court for a Writ of Certiorari to the Louisiana Fourth Circuit. ARCASA's Writ was granted, and the Louisiana Fourth Circuit's Judgment was vacated. *Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ___, 114 S.Ct. 2701, 129 L.Ed. 2d 830 (1994). This Court remanded these proceedings to the Louisiana Fourth Circuit for further proceedings in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ___, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994). ENSIDESA's original Petition for Writ of Certiorari to this Court (No. 93-1040) was based on the allegation of jury misconduct, and did not raise any liability issue, including the issues of whether ENSIDESA was liable to the plaintiff as the charterer of the M/V LORENA, or whether ENSIDESA was liable to the plaintiff as the loading stevedore, as found by the Louisiana Fourth Circuit in its original opinion. This Court denied ENSIDESA's Petition for Writ for Certiorari. *Empresa Nacional Siderurgica, S.A. V. Young*, 512 U.S. ___, 114 S.Ct. 1067 (1994), attached at Appendix, A-1.

Further proceedings were held in the Louisiana Fourth Circuit. That Court agreed with ARCASA's argument, found that ARCASA had no liability to Young, and dismissed Young's claims against ARCASA. However, the Louisiana Fourth Circuit upheld the original Judgment against ENSIDESA, which was now found to be solely liable for Young's damages. 645 So.2d 1266 (La. App. 4 Cir. 1994). ENSIDESA applied for a Writ from the Louisiana Supreme Court, which was denied. ENSIDESA has now filed this Petition for Writ of Certiorari from this Honorable Court.

REASONS FOR DENYING ENSIDESA'S PETITION FOR WRIT OF CERTIORARI

In its original opinion, the Louisiana Fourth Circuit discussed the liability of ENSIDESA and held as follows:

> Under the facts of this case, the duty owed under *Scindia* [*Steam Navigation Co. v. De Los Santos*, 451 U.S., 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981)] by ARCASA is not significantly different than that owed by ENSIDESA under *Scindia*. Based upon the evidence, we are unable to say that the jury would have been clearly wrong to conclude that a "reasonable . . . time charterer would have perceived the dangers presented by the [stow]." See, *Woods [v. Sammisa Co., Ltd.]*, 873 F.2d [842] at 852. **In addition, ENSIDESA, as loading stevedore, clearly bears responsibility for the dangerous condition presented by the beams which it stowed. ENSIDESA breached its**

> **duty of reasonable care under all of the circumstances, in failing to load the vessel so that it could be off-loaded with reasonable safety.** (Emphasis added.)

Young, 617 So.2d at 528-529.

In addition to finding ENSIDESA liable to the plaintiff as the charterer of the vessel, the Fourth Circuit also found that ENSIDESA was liable because it was the loading stevedore, and as the loading stevedore it failed to properly stow the cargo.

In addition to all other reasons which may be advanced by Young, in his Brief in Opposition to the Petition for Writ of Certiorari, Cooper further argues that the Writ should be denied for the following reasons:

1. The Fourth Circuit's ruling on the issue of ENSIDESA's liability to Young is now the law of the case. Because ENSIDESA failed to appeal the liability issues in its original Petition for Writ of Certiorari filed with this Court, ENSIDESA has waived its right to advance those arguments at this time.

2. Irrespective of any arguments that ENSIDESA might advance regarding its liability to Young as the vessel owner/charterer in light of this Court's holding in *Howlett v. Birkdale Shipping Co., Inc.*, S.A., 512 U.S. ___, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994), ENSIDESA is still liable to the plaintiff as the loading stevedore. This Court's decision in *Howlett* addressed the vessel owner's duties to a longshoreman. It did not in any way address the

issue of a loading stevedore's liability to the employees of an unloading stevedore.

I.

THE HOLDING OF THE LOUISIANA FOURTH CIRCUIT REGARDING ENSIDESA'S LIABILITY IS LAW OF THE CASE BECAUSE ENSIDESA FAILED TO APPEAL THAT ISSUE TO THIS COURT, AND SOUGHT A WRIT OF CERTIORARI ONLY ON THE ISSUE OF JURY MISCONDUCT

In its Petition for Writ of Certiorari currently pending before this Court, ENSIDESA states:

> As a result of this denial, both ENSIDESA and ARCASA applied to this Court for a Writ of Certiorari raising issues of procedural and substantive law. ARCASA's application was docketed on December 23, 1992, and ENSIDESA's was on December 28, 1993. While ENSIDESA's Petition was denied, ARCASA's was granted on June 20, 1994 . .

Empresa Nacional Siderurgica, S.A. v. Young, No. 94-2034, Pet. at p.7.

What ENSIDESA fails to mention is that its application sought a writ only on the issue of jury misconduct. *See*, Petition in No. 93-1040. ENSIDESA chose not to appeal any liability issue to this Court. ENSIDESA's last opportunity to obtain relief from the Judgment died when its Petition for Writ of Certiorari was denied. Appendix, A-1. However, ARCASA's writ was granted, and the original

Judgment was vacated and remanded to the Louisiana Fourth Circuit for further proceedings. Even though ENSIDESA's writ was denied and ENSIDESA failed to appeal any liability issue, ENSIDESA has nevertheless attached itself to ARCASA's coattails and is attempting to obtain a second chance to appeal the liability issues.

Cooper submits that ENSIDESA's appeal is foreclosed, and the Fourth Circuit's original ruling has become law of the case, and ENSIDESA cannot continue to prosecute this Petition for Writ of Certiorari.

As far back as 1939, federal courts have recognized the doctrine of law of the case. In *Pike Rapids Power Co. v. Minneapolis, St. Paul & S.S.M.Ry. Co.*, 106 F.2d 891 (8th Cir. 1939) a first appeal was taken, the Judgment of the district court was modified, and the matter was remanded with instructions to vacate the original judgment and enter a new judgment not inconsistent with the opinion of the appellate court. A second appeal presented the question of whether on remand the lower court entered a judgment consistent with the opinion of the appellate court. During the first appeal, the original plaintiff made no contention that the claim for certain disbursements should be allowed as compensation for expropriation of property. The Eighth Circuit specifically found that that part of the judgment was never challenged, nor was there any motion filed to modify the judgment or the district court's mandate. In ruling on the second appeal, the Eighth Circuit held that although it had vacated and remanded the case previously:

> The [first] opinion of this court became the law of the case and is not open for reconsideration on this second appeal ... We can not on this appeal

> consider new issues, nor can we modify the previous opinion and mandate of this court.

Pike, 106 F.2d at 894.

In *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987), the Circuit Court for the District of Columbia, in discussing the law of the case doctrine, held:

> Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time. The doctrine encompasses a court's explicit decisions, as well as those issues decided by necessary implication. The purpose of the doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." (Citations omitted.)

Williamsburg Wax Museum, 810 F.2d at 250.

In discussing some of the policy reasons behind this doctrine, the Fifth Circuit Court of Appeals held in *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745 (5th Cir. 1985) that:

> The law of the case doctrine, as formulated in this circuit, generally precludes reexamination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court

> itself on a subsequent appeal. This doctrine "is based on the salutary and sound public policy that litigation should come to an end." Indeed, if every question once considered and decided remained open for reexamination in subsequent proceedings in that same case, an appellate court could not efficiently or satisfactorily perform its duties. Moreover, the law of the case doctrine "discourages 'panel shopping' at the circuit level for in today's climate it is most likely that a different panel will hear subsequent appeals." Nevertheless, it is well established that the doctrine is not an inexorable command but a rule of practice, usually followed but limited in scope. (Footnote and citations omitted.)

Todd, 763 F.2d at 750.

Cooper submits that the law of the case doctrine should be applied in this case, and further submits that ENSIDESA waived its rights to subsequent appeals on the issue of its liability. As noted above, the Louisiana Fourth Circuit held that ENSIDESA was liable as the vessel owner/charterer, and also as the loading stevedore. ENSIDESA filed an application for a writ to the Louisiana Supreme Court, which was denied. ENSIDESA then sought a Writ of Certiorari from this Court; however, it only sought the Writ on the issue of jury misconduct. The liability issues were abandoned and waived at that point.

ENSIDESA's actions clearly bring this doctrine into play. First, the issue of liability went unchallenged when ENSIDESA sought its first Writ of Certiorari (No. 93-1040) from this Court. Following the reasoning of the United States Court of Appeal for the District of Colombia set out

in *Williamsburg Wax Museum*, *supra*, an unchallenged legal decision when the opportunity to do so existed becomes the law of the case for future stages of the litigation. ENSIDESA clearly had the right and the opportunity to challenge the decisions involving its liability when it sought its first Writ of Certiorari to this Court. ENSIDESA chose not to advance any arguments on that issue, and thereby waived its right to challenge that decision at some later time.

Cooper therefore submits that this Honorable Court should deny this new request for a Writ of Certiorari because ENSIDESA is raising liability issues which were waived when ENSIDESA previously sought a Writ of Certiorari from this Honorable Court over one year ago. By failing to take an appeal of this issue, ENSIDESA allowed the Louisiana Fourth Circuit's ruling on its liability to become law of the case.

II.

EVEN IF THE LOUISIANA FOURTH CIRCUIT'S RULING IS NOT LAW OF THE CASE, THE PETITION FOR WRIT OF CERTIORARI SOUGHT BY ENSIDESA MUST BE DENIED BECAUSE ENSIDESA WAS FOUND LIABLE AS THE LOADING STEVEDORE AND *HOWLETT V. BIRKDALE SHIPPING CO., S.A.* IS NOT APPLICABLE

ENSIDESA's Petition for Writ of Certiorari does mention, in passing, that it was the loading stevedore. However, the entire thrust of the Writ of Certiorari is directed to the issue of ENSIDESA's liability as the vessel owner/charterer. Although it might be argued that the

Louisiana Fourth Circuit did not follow the mandate set forth by this Court's Writ of Certiorari, Cooper submits that ENSIDESA's argument becomes irrelevant because the Writ, based on this Court's decision in *Howlett*, did not address the issue of ENSIDESA's liability as the loading stevedore. That issue was never appealed and this Court did not render any ruling which implicitly or explicitly suggested that the Louisiana Fourth Circuit's original decision was incorrect.

In all of the numerous appeals that have been filed in this case, the primary liability issue related the duties of a vessel owner/charterer pursuant to Section 905(b) of the LHWCA and this Court's decision in *Scindia*. Neither *Scindia* nor its progeny has ever suggested that the loading stevedore has the same obligations as a vessel owner.

In particular, the "turnover duty," which has become crucial in this case, simply does not apply to a loading stevedore. To apply the turnover duty to a loading stevedore would directly contradict the reasoning cited by the courts which have ruled on the issue. The courts that have looked at this issue have consistently found that the vessel owner/charterer is not an expert stevedore, and is not required to oversee an expert stevedore during the loading or unloading of its vessel. To do so would essentially make a vessel owner, which would be nothing more than an "amateur stevedore," the supervisor of a supposedly expert stevedore.

These factors were recently discussed by the United States Court of Appeals for the Fifth Circuit in *Couch v. Cro-Marine Transport, Inc.*, 44 F.3d 319 (5th Cir.), *reh'g en banc denied*, 50 F.3d 1035 (5th Cir. 1995). In *Couch*, a longshoreman employed by a discharging stevedore was injured while attempting to off-load steel cargo from a barge.

The district court found that the stevedore which loaded the barge had loaded it improperly, and also found that the improper stow contributed to Couch's accident.

The NOSC, the loading stevedore in *Couch*, argued that the duty it owed to a discharging stevedore is equivalent to the duty that a shipowner owes to a stevedore under *Scindia*. NOSC made an argument similar to ENSIDESA's argument, and submitted that it could not be held liable because the stow constituted an open and obvious condition. Under *Scindia*, a vessel owner does not have a duty to warn of open and obvious conditions, but must only warn of hidden defects. The Fifth Circuit disagreed with NOSC and affirmed the district court, holding:

> The district court refused to apply *Scindia*, citing crucial differences between the position of the vessel owner in relation to the discharging longshoremen and the position of the loading stevedore in relation to the discharging longshoremen. We hold that the district court was correct for several reasons.

Couch, 44 F.3d at 324. Just as ENSIDESA does in this case, NOSC in *Couch*, although using different reasoning, attempted to have the Fifth Circuit apply this Court's decision in *Howlett*. In rejecting this argument, the Fifth Circuit further held:

> In its supplemental brief and at oral argument on appeal, NOSC contends that [*Howlett*] strongly reinforces its argument that the *Scindia* standard should govern the relationship between the on-loading stevedore and the discharging longshoremen. The issue addressed by the Court

> in *Howlett*, a section 905(b) suit against a shipowner, was the scope of a shipowner's duty to warn of latent hazards in the cargo stow. Although *Howlett* elaborates the scope of the first *Scindia* duty, it does not help NOSC overcome the insurmountable hurdle of applying the *Scindia* standard to a case involving a suit by an injured longshoreman against a loading stevedore. *Scindia* and *Howlett* are section 905(b) cases brought against shipowners and do not support NOSC's contention that the *Scindia* standard should apply in this case, a negligence suit under the general maritime law against a party other than the vessel owner.

Couch, 44 F.3d at 325.

The Fifth Circuit also discussed the policy considerations for its holding, and considered the very nature of the parties to be crucial in rejecting the argument that *Scindia* and *Howlett* should be applied to a loading stevedore:

> In *Scindia* and *Howlett*, the Court considered the relationship between and roles of the stevedore-employer and the vessel owner. Emphasizing the role of the stevedore-employer as a specialist in cargo operations on one side and the non-expert vessel on the other side, the Court reasoned that, as between those two parties, the stevedore-employer was in the best position to prevent injuries to longshoremen. Unlike the shipowner in *Scindia*, NOSC, as loading stevedore, is indeed an expert in cargo operations, thus creating a very different relationship, with experts in stevedoring

> on both sides. Therefore, the reasoning of the court in *Scindia* for crafting a limited scope of liability for the non-expert vessel based on the justifiable expectations of the shipowner does not logically apply to the facts of this case. Accordingly, based on the facts of this case, the onloading stevedore was in the best position to avoid creating a dangerous stow and therefore may be held liable for any injuries suffered by discharging longshoremen caused by its negligent stow. (Footnote omitted.)

Couch, 44 F.3d at 325-326.

After discussing what law is applicable to the loading stevedore, the Fifth Circuit discussed the appropriate standard of care as follows:

> We hold that a loading stevedore must load the cargo so that an expert and experienced stevedore will be able to discharge the cargo with reasonable safety by exercising reasonable care.

Couch, 44 F.3d at 327.

As quoted above, the Louisiana Fourth Circuit found that ENSIDESA breached its duty of reasonable care under the circumstances because it failed to load the vessel so that the vessel could be offloaded with reasonable safety. The Louisiana Fourth Circuit's opinion clearly shows that the appropriate standard of care was used to find ENSIDESA liable to Young in its capacity as the loading stevedore.

The respondent submits that irrespective of whether or not *Scindia* or *Howlett* applies to ENSIDESA in its capacity

of vessel owner/charterer, those cases do not apply to ENSIDESA in its capacity as a loading stevedore. The Louisiana Fourth Circuit correctly found that in addition to any other liability, ENSIDESA was also liable as the loading stevedore. Clearly, the duties enunciated in both *Scindia* and *Howlett* do not apply to ENSIDESA in that capacity.

CONCLUSION

In summary, Cooper submits that ENSIDESA's Writ of Certiorari must be denied for two reasons. First, the issue of ENSIDESA's liability, in particular its liability as the loading stevedore, has become law of the case. In its previous Petition for Writ of Certiorari filed with this Court, ENSIDESA failed to raise any issues regarding its liability to Young, and chose only to argue the issue of jury misconduct. The Louisiana Fourth Circuit's ruling on that issue has become law of the case, and cannot be appealed further.

Secondly, ENSIDESA was originally found liable to the plaintiff as both the vessel owner/charterer and as the loading stevedore. Irrespective of what effect the *Howlett* decision may have on ENSIDESA's liability as the vessel owner/charterer, it clearly has no application to the issue of whether ENSIDESA is liable as the loading stevedore. As such, the Louisiana Fourth Circuit's ruling on that issue is correct, and no Writ of Certiorari should not be granted, and thereby give ENSIDESA further opportunity to continue these appeals, and prevent collection of the valid judgment obtained by Young and Cooper.

Respectfully submitted,

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